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CPLR 3120(a): Discovery of Defendant Hospital's Non-Medical Records Relating to Non-Party

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that a marshall would commit perjury if he signs for a landlord's agent, as was apparently done in this case.¹⁰²

The lamentable reluctance of our district attorneys to prosecute those who commit perjury in civil actions is in significant part responsible for the practice so rightfully condemned in the instant case. Judge Lane is to be commended for his righteous indignation about this blatant misuse of the judicial process.

ARTICLE 31 — DISCLOSURE

CPLR 3101(d): Discovery limited to reports received prior to rejection of claim.

While "all evidence material and necessary in the prosecution or defense of an action"¹⁰³ is subject to disclosure, material prepared for litigation need not be disclosed unless: (1) it can no longer be duplicated, and (2) failure to disclose will cause undue hardship.¹⁰⁴ The scope of this conditional immunization has been a source of extensive litigation, especially in regard to insurance companies' investigative reports.¹⁰⁵ At what point do reports prepared by independent investigators for an insurance company become entitled to the conditional protection of CPLR 3101(d)?

At issue in *Millen Industries, Inc. v. American Mutual Liability Insurance Co.*,¹⁰⁶ was whether such reports concerning dishonest acts of employees of a policyholder were protected. The Appellate Division, First Department, determined that: (1) the business of the defendant included payment or rejection of claims, and (2) reports which aided in such determinations were made in the ordinary course of business rather than in preparation for litigation. Subsequent reports, however, were held to be within the ambit of CPLR 3101(d).¹⁰⁷

CPLR 3120(a): Discovery of defendant hospital's non-medical records relating to non-party.

In *Mayer v. Albany Medical Center Hospital*,¹⁰⁸ the Appellate Division, Third Department, approved disclosure of non-medical information concerning a patient who had assaulted a visitor in the de-

¹⁰² 67 Misc. 2d at 738, 324 N.Y.S.2d at 933, citing N.Y. PENAL LAW art. 210 (McKinney 1967).

¹⁰³ CPLR 3101(a).

¹⁰⁴ CPLR 3101(d).

¹⁰⁵ 3 WK&M ¶ 3101.50b.

¹⁰⁶ 37 App. Div. 2d 816, 324 N.Y.S.2d 930 (1st Dep't 1971) (per curiam).

¹⁰⁷ *Id.*, 324 N.Y.S.2d at 931.

¹⁰⁸ 37 App. Div. 2d 1011, 325 N.Y.S.2d 517 (3d Dep't 1971) (mem.).

fendant hospital's psychiatric ward. Thereafter, the assaulted visitor, joined by her husband, commenced an action in negligence. Plaintiffs alleged that the defendant had not properly supervised dangerous psychiatric patients, and sought information concerning the assailant patient's propensities in order to charge the defendant with prior knowledge. Defendant, by cross motion, challenged plaintiff's notice of discovery and inspection insofar as it related to the records on a non-party who had not been served with notice. The appellate court concluded that

[p]laintiffs [were] entitled to all non-medical data pertaining to prior assaults or attempted assaults by the patient, including the time and place and surrounding circumstances, together with the date the information came within the knowledge of defendant. . . . [and the] length and number of times the patient was confined to the defendant's institution.¹⁰⁹

This disposition is laudable. The fact that the requested records related to a non-party who had not been given notice of the action should not bar disclosure in these circumstances.¹¹⁰ The defendant, in possession and control of these records, failed to show any prejudice to the non-party or any other reason for requiring that notice be given to the latter where CPLR 3120 does not mandate it.

ARTICLE 32 — ACCELERATED JUDGMENT

Collateral Estoppel: The preclusive effect of arbitration awards.

Arbitration, like litigation, may have the effect of *res judicata*. A proper proceeding will bar further litigation of the same cause of action between parties who participated in the arbitration,¹¹¹ as well as estop the relitigation of issues actually determined therein.¹¹² The

¹⁰⁹ *Id.*, 325 N.Y.S.2d at 518.

¹¹⁰ See *Alamo v. New York*, 51 Misc. 2d 950, 274 N.Y.S.2d 366 (Ct. Cl. 1966), wherein the state was directed to furnish at the examination before trial: (1) an assailant prisoner's history prior to and during his stays at specified state hospitals; (2) the length of his stays and the names and addresses of his doctors; and (3) "[a]ny nonmedical observations recorded in the hospitals[;]" and (4) "[o]bservations of his propensities not related to medical and psychiatric observations, inquiry or analysis concerning [the assailant's] propensities." *Id.* at 952, 274 N.Y.S.2d at 367-68.

¹¹¹ *Garnett v. Kassover*, 8 App. Div. 2d 631, 185 N.Y.S.2d 435 (2d Dep't 1959) (mem.); *Abrams v. Macy Park Constr. Co.*, 282 App. Div. 922, 125 N.Y.S.2d 256 (1st Dep't 1953) (mem.); *Campe Corp. v. Pacific Mills*, 275 App. Div. 634, 92 N.Y.S.2d 347 (1st Dep't 1949) (per curiam); *Springs Cotton Mills v. Buster Boy Suit Co.*, 275 App. Div. 196, 88 N.Y.S.2d 295 (1st Dep't), *aff'd*, 300 N.Y. 586, 89 N.E.2d 877 (1949) (mem.); *Goldblatt v. Board of Educ.*, 52 Misc. 2d 238, 275 N.Y.S.2d 550 (N.Y.C. Civ. Ct. N.Y. County 1966), *aff'd*, 57 Misc. 2d 1089, 294 N.Y.S.2d 272 (App. T. 1st Dep't 1968) (per curiam).

¹¹² *Schuykill Fuel Corp. v. B.&C. Nieberg Realty Corp.*, 250 N.Y. 304, 165 N.E. 456 (1929); *At Home Wear, Inc. v. S.D. Sales Corp.*, 64 Misc. 2d 202, 314 N.Y.S.2d 654 (N.Y.C. Civ. Ct. N.Y. County 1970).